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93-60

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October 1993 Term

BART H. DYE, ET AL.,

Petitioners,

v.

MIKE EPSY, SECRETARY OF AGRICULTURE, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Plaintiffs

Bart H. Dye,

Petitioner,

v.

Mike Espy, Secretary of Agriculture; Charles W. Shuman, Administrator of the Farmers Home Administration; Ralph W. Leet, State Director of the Farmers Home Administration; Harold T. Aasmundstad, District Director of the Farmers Home Administration of North Dakota; Glen W. Binegar, as District Director of the Farmers Home Administration of North Dakota; Allen G. Drege, as District Director of the Farmers Home Administration of North Dakota; Dennis W. Larson, as District Director of the Farmers Home Administration of North Dakota; Odell O. Ottmar, as District Director of the Farmers Home Administration of North Dakota; Joseph J. Schneider, as District Director of the Farmers Home Administration of North Dakota; Samuel Delvo, as County Supervisor of the Farmers Home Administration in North Dakota; Lorace Hakanson, as County Supervisor of the Farmers Home Administration in North Dakota; Larry Leier, as County Supervisor of the Farmers Home Administration in North Dakota; Charles Schaefer, as County Supervisor of the Farmers Home Administration in North Dakota; James Well, as County Supervisor of the Farmer's Home Administration in North

Dakota; Ralph W. Leet, State Director of the Farmers Home Administration,

Respondents.

Dwight Coleman; Lester Crowsheart; Sharon Crowsheart; Russel Folmer; Anna Mae Folmer; George Hatfield; June Hatfield; Donna McCabe; Diane McCabe, on behalf of themselves and others similarly situated; Gary A. Barrett; Rosemary K. Barrett; Richard L. Harmon; Betty J. Harmon; Larry L. Robertson; Nancy K. Robertson; Ross Wade; Maureen Wade;

Plaintiffs

Carl Saine; Judie Saine,

Petitioners,

v.

Mike Espy, Secretary of Agriculture; Charles W. Shuman, Administrator of the Farmers Home Administration; Ralph W. Leet, State Director of the Farmers Home Administration; Harold T. Aasmundstad, District Director of the Farmers Home Administration of North Dakota; Glen W. Binegar, as District Director of the Farmers Home Administration of North Dakota; Allen G. Drege, as District Director of the Farmers Home Administration of North Dakota; Dennis W. Larson, as District Director of the Farmers Home Administration of North Dakota; Odell O. Ottmar, as District Director of the Farmers Home Administration of North Dakota; Joseph J. Schneider, as District Director of the Farmers Home Administration of North Dakota; Samuel Delvo, as County Supervisor of the Farmers Home Administration in North Dakota; Lorace Hakanson, as County Supervisor of the Farmers Home Administration in North Dakota; Larry Leier, as County Supervisor of the Farmers Home Administration in North Dakota; Charles

Schaefer, as County Supervisor of the Farmers Home Administration in North Dakota; James Well, as County Supervisor of the Farmer's Home Administration in North Dakota; Ralph W. Leet, State Director of the Farmers Home Administration

Respondents.

QUESTION PRESENTED FOR REVIEW

Does the doctrine of sovereign immunity bar compensatory contempt proceedings against federal officials for violation of an injunction lawfully entered by a federal district court with jurisdiction of the parties and the subject matter.

PARTIES TO THE PROCEEDING

This case is the consolidation of two contempt proceedings brought by unnamed members of a class action. The caption of the case reflects the original named parties in the class action. The contempt proceeding brought by petitioner Bart Dye sought contempt against the Secretary of Agriculture and the Administrator of the Farmers Home Administration, both of whom are listed in the caption of the case. In addition, Dye sought contempt against Oscar T. Blank, State Director of the Farmers Home Administration for Indiana; Emerson Martin, District Director of the Farmers Home Administration for Martin County, Indiana; and, T. Edward Cox, County Supervisor of the Farmers Home Administration for Martin County, Indiana.

Petitioners Carl and Judie Saine sought a finding of contempt against the Secretary of Agriculture, who is listed in the caption of the case. In addition, the Saines sought a finding of contempt against Larry Godwin, North Carolina State Director of the Farmers Home Administration, Patrick Van

Denton, District Director of the Farmers Home Administration of North Carolina; and, Lamar Wortman, County Supervisor, Lincoln County, North Carolina, of the Farmers Home Administration.

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PRELIMINARY STATEMENT

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to reverse its decision, Coleman v. Espy, 986 F.2d 1184 (8th Cir. 1993), which affirmed the order of the United States District Court for the District of North Dakota, the Honorable Bruce M. Van Sickle, District Court Judge, in which the District Court dismissed the petitioners' contempt proceedings. Coleman v. Madigan, Civil No. A1-83-047-07 and Civil No. A1-83-47-20 (D.N.D. July 5, 1991.).

The Court of Appeals decision which the petitioners seek to be reviewed was issued on February 23, 1993. On March 9, 1993, petitioners filed a motion pursuant to Rule 35 and Rule 40 of the Rules of Appellate Procedure for rehearing and rehearing en banc of the panel decision of the Court of Appeals. The motion for rehearing was denied by the Court of Appeals in its order dated April 5, 1993. Petitioners timely filed this petition for certiorari pursuant to Sup. Ct. R. 14.

STATUTES INVOLVED IN THIS ACTION

1. Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1988):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employees thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

2. 18 U.S.C. § 401:

> Power of court
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as-
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT OF CASE

This case arises out of a nationwide class action, in which the District Court issued a permanent injunction, prohibiting defendants from specified acts which would lead to the foreclosure of farmers with loans with the Farmers Home Administration.[1] Coleman v. Block, 580 F. Supp. 194 (D.N.D. 1984).[2]

This injunction remained in force until February, 1989, when the action was dismissed as a result of the passage of The Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, which superseded the defendants' policies and regulations

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[1]The district court had jurisdiction of the action pursuant to 28 U.S.C. § 1331 and § 1361 since the underlying case presented federal statutory and constitutional questions regarding the actions of the defendant Farmers Home Administration.

[2]Among the most important actions prohibited by the injunction, the defendants were enjoined from accelerating loans, foreclosing on property, or demanding voluntary conveyance by the farmers without providing the farmers thirty days notice of the action, giving the borrowers a statement of the reasons for the proposed action, informing the borrower of the right to a hearing to contest the action, and providing the borrower other specified information. Coleman v. Block, 580 F.Supp. 194, 211 (D.N.D. 1984).

which were affected by the injunction.[3]

The petitioners are farmers who were members of the class action, and who brought civil contempt proceedings against defendants, alleging that the defendants violated the district court's injunction while it was in effect, wrongfully foreclosed upon and took possession of the petitioners' farms, and continued to wrongfully hold those farms, which are still in defendants' possession at the present.

Pursuant to the local rules of the district court, the petitioners filed motions requesting the district court to enter orders to show cause as to why the defendants should not be held in contempt.[4] In both cases, the district court initially

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[3]The defendants appealed portions of the District Court's injunctions, though not the essential provisions which are the subject of the instant contempt proceedings. The plaintiffs cross-appealed regarding other issues. This Court held that the passage of the Agricultural Credit Act mooted the action, and ordered the action dismissed. Coleman v. Lyng, 864 F.2d 604 (8th Cir. 1988), *cert. denied*, 493 U.S.953 (1989).

[4]Appellant Bart Dye filed his petition on October 21, 1985. Initially, his petition was filed in a separate action, but was later consolidated with the class action. The Saines filed their motion to find defendants in contempt on February 2, 1990.

ordered the defendants to show cause why they should not be held in contempt. Subsequently, in deciding cross-motions of the parties for summary judgment, the district court dismissed both of the contempt proceedings on the ground that the dismissal of the underlying action divested the district court of jurisdiction to hear these contempt proceedings. The district court rejected, however, the defendants' argument that sovereign immunity barred the contempt proceedings.

On appeal, the Court of Appeals held that the district court was in error in concluding that it did not have jurisdiction to hear the contempt proceedings, in that the dismissal of the underlying action does not moot claims for compensatory civil contempt. However, the panel of the Court of Appeals affirmed the dismissal of the contempt proceedings on the ground that the actions were barred by sovereign immunity.[5]

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[5]The panel opinion stated that any recovery for violations caused by the officials' failure to adhere to the appropriate standard of care must be sought through the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

ARGUMENT

I. Introduction

This case presents three compelling grounds for the granting of certiorari. First, the issue of whether federal officials are immune from compensatory contempt proceedings for violations of a lawfully entered injunction is a critical issue which has not been determined by this Court. This issue determines whether federal courts have the means to enforce their orders and defines the relationship between the judicial and executive branches of government. Second, the lower federal courts are divided on this issue, and this Court should resolve the conflict. Finally, the decision of the Court of Appeals in this case, holding that sovereign immunity bars such compensatory contempt proceedings, violates well-established judicial principles and should be reversed.

II. The issue of whether sovereign immunity bars contempt proceedings for violation of a lawfully entered order is a question of exceptional importance which should be determined by this Court.

A fundamental premise of American law, announced by this Court almost fifty years ago, is: "An order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and properly proceedings." United States v. United Mine Workers of America, 330 U.S. 258, 193 (1947). Such a rule is necessary for the protection of the party in whose favor the court's injunction was entered and, more important, is essential for the preservation of the integrity of our judicial system and rule of law. This Court has recognized that "Courts have inherent power to enforce compliance with their lawful orders through civil contempt." Spallone v. United States, 493 U.S. 265, 276 (1990)(quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)). Therefore, this issue of whether compensatory contempt proceedings are barred by sovereign immunity "involves a fundamental question relating to the inherent power of the federal judiciary as a co-equal branch of government." McBride v. Coleman, 955 F.2d 571, 583 (8th Cir. 1992) *cert. denied* _____ U.S. _____ 113 S. Ct. 65 (1992)(Lay, concurring

and dissenting). However, as noted by the district court in this action, this Court has not addressed the issue of whether the doctrine of sovereign immunity bars contempt proceedings against federal officials. "The issue of whether sovereign immunity applies to contempt proceedings against the federal government and the FmHA in particular, has not been visited by the United States Supreme Court." Coleman v. Madigan, Civil No. A1-83-047-07 and Civil No. A1-83-47-20 (D.N.D. July 5, 1991.), p. 4.

III. The lower courts are divided on this important issue.

The federal courts of appeal have reached different conclusions regarding whether sovereign immunity bars compensatory contempt proceedings. In accord with the opinion of the court of appeals below, the United States Court of Appeals for the Ninth Circuit, in the case of Barry v. Bowen, 884 F.2d 442 (9th Cir. 1989), held that contempt sanctions against the Secretary of Health and Human Services for failure to pay court ordered awards were barred on the grounds of sovereign immunity. In contrast, the United States Court of

Appeals for the Fifth Circuit upheld a civil contempt fine against the administrator of the Drug Enforcement Administration for violation of a court order. Norman Bridge Drug Co. v. Banner, 529 F.2d 822 (5th Cir. 1976). In addition, the United States Court of Appeals for the Seventh Circuit upheld a civil contempt award against officials of the Internal Revenue Service for failure to obey the court's injunction. Nelson v. Steiner, 279 F.2d 944 (7th Cir. 1960). *See also*, Hinton v. Sullivan, 737 F. Supp. 232 (S.D.N.Y. 1990)(contempt damages awarded against Secretary of Health and Human Services). It is appropriate for this Court to resolve this division among the courts of appeal of such a fundamental question as is presented by this case.

IV. The decision of the Court of Appeals that sovereign immunity bars compensatory contempt proceedings is in error, violates fundamental judicial principles, and should be reversed.

A final reason that this Court should grant certiorari in this case is that the Court of Appeals opinion violates central

principles of American law - specifically that the judiciary is a co-equal branch of government, and has the authority to insure compliance with its orders by the executive branch, and that federal officials are not elevated above state officials, whom courts, including the Court of Appeals below, have frequently found subject to contempt proceedings.

The Court of Appeals' opinion fails to recognize two independent sources of judicial authority for compensatory contempt proceedings against federal officials. First, the Administrative Procedure Act (APA) expressly waives sovereign immunity in actions other than those seeking money damages. 5 U.S.C. § 702 (1988). In enacting the APA, the Congress recognized "So too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a federal agency or officer acting in an official capacity." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 *reprinted in* 1976 U.S.C.C.A.M. 6121, 6129. The language of the statute carries out this purpose in unequivocal language:

> An action in a court of the United States seeking relief other than money damages and

> stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States..."

5 U.S.C. § 702.

This Court has broadly interpreted what relief constitutes an "equitable suit for specific relief." In Bowen v. Massachusetts, 487 U.S. 879 (1988), this Court held that Section 702 permits an action to recover monies wrongfully held by a federal defendant. In the instant case, the petitioners' farms were wrongfully foreclosed upon by defendants, and the defendants now hold those farms in inventory. The district court could fashion a broad range of possible relief to restore the petitioners to the position they are entitled to, but for the defendants' violation of the district court's injunction.

A second basis for the exercise of contempt authority over federal officials is the courts' inherent authority to enforce compliance with their lawful orders. In the case of Spallone v. United States 493 U.S. 265 (1990), this Court specifically recognized and cited this authority. Moreover, the Court, in

Spallone, rejected the notion that general immunity principles were applicable in contempt proceedings. In Spallone, the district court had imposed sanctions against the City of Yonkers and members of its city council for failure to carry out a court-ordered housing desegregation plan. The city ultimately complied with the order, and the question before this Court was whether the fines assessed during the period of violation of the order were valid. The defendants in Spallone argued that general doctrines of legislative immunity protected officials from contempt proceedings. This Court rejected the arguments, stating "the holdings in these cases do not control the question of whether local legislators such as petitioners should be immune from contempt sanctions...." 110 Sup. Ct. 625, 633-34 (1990) Likewise, in this case, the doctrine of sovereign immunity must yield to the inherent, and essential, authority of the court to enforce its own orders.

Finally, the Court of Appeals order seriously undercuts principles of federalism. Many courts, in the context of enforcing injunctions against state officials, have recognized that

it is essential that the courts have the inherent authority to enforce their orders against these state officials, notwithstanding the Eleventh Amendment to the United States Constitution. Indeed, the Court of Appeals below, in the case of Welch v. Spangler, 939 F.2d 570 (8th Cir. 1989), upheld an award of contempt damages against a state prison official for violation of a court order. In doing so, the court stated:

> Not imposing a substantial fine in this case would be tantamount to inviting the prison officials to ignore the dictates [of the order], thereby undermining the authority of the court to insure compliance with its orders.

939 F.2d 572.

The Eleventh Amendment and sovereign immunity derive from respect for the different branches and levels of government. And, "the reasoning of cases discussing federal sovereign immunity almost always carries over to Eleventh Amendment cases...and vice-versa." Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part I*, 126 U. Pa. L. Rev.

515, 517 (1978)(footnote omitted).[6] The disparate treatment of state and federal officials by the courts below should be reversed so that all officials abide by the fundamental rule of law that parties must honor lawfully entered orders by the courts.

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[6]The Court of Appeals suggested in its order that the petitioners should pursue their claims under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.* This misses the essential point that the petitioners' rights derive from the lawfully entered order of the district court, as opposed to the statutory and constitutional provisions upon which the petitioners' causes of action were based. Moreover, courts have uniformly rejected attempts to use the Federal Tort Claims Act to redress violations of Farmers Home Administration duties. Williamson v. U.S. Dept. of Agriculture, 815 F.2d 368 (5th Cir. 1987); Selland v. U.S., 966 F.2d 346 (8th Cir. 1992). Indeed, in another contempt claim arising out of the same class action, the Court of Appeals for the Eighth Circuit upheld the dismissal of a farmer's Tort Claim Act claim arising out of the violation of the Coleman injunctions. Klett v. Pim, 965 F.2d 587 (8th Cir. 1992).

CONCLUSION

For the reasons stated above, petitioners respectfully pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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By: MICHAEL D. CALHOUN

July, 1993

PETITIONERS' APPENDIX

A. Opinion, United States Court of Appeals for the Eighth Circuit, February 23, 1993

B. Memorandum and Order, United States District Court for the District of North Dakota, July 5, 1991

C. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Eighth Circuit, April 5, 1993

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-3123

Dwight Coleman; Lester Crowsheart; Sharon Crowsheart; Russel Folmer; Anna Mae Folmer; George Hatfield; June Hatfield; Donna McCabe; Diane McCabe, on behalf of themselves and others similarly situated; Gary A. Barrett; Rosemary K. Barrett; Richard L. Harmon; Betty J. Harmon; Larry L. Robertson; Nancy K. Robertson; Ross Wade; Maureen Wade;

Plaintiffs

Bart H. Dye,

Appellant,

v.

Mike Espy,* Secretary of Agriculture; Charles W. Shuman, Administrator of the Farmers Home Administration; Ralph W. Leet,

Appeals from the United States District Court for the District of North Dakota

*Mike Espy is substituted for former Secretary of Agriculture Edward Madigan as an appellee in this action pursuant to Fed. R. App. P. 43(c).

State Director of the Farmers Home Administration; Harold T. Aasmundstad, District Director of the Farmers Home Administration of North Dakota; Glen W. Binegar, as District Director of the Farmers Home Administration of North Dakota; Allen G. Drege, as District Director of the Farmers Home Administration of North Dakota; Dennis W. Larson, as District Director of the Farmers Home Administration of North Dakota; Odell O. Ottmar, as District Director of the Farmers Home Administration of North Dakota; Joseph J. Schneider, as District Director of the Farmers Home Administration of North Dakota; Samuel Delvo, as County Supervisor of the Farmers Home Administration in North Dakota; Lorace Hakanson, as County Supervisor of the Farmers Home Administration in North Dakota; Larry Leier, as County Supervisor of the Farmers Home Administration in North Dakota; Charles Schaefer, as County Supervisor of the Farmers Home Administration in North Dakota; James Well, as County Supervisor of the Farmer's Home Administration in North Dakota; Ralph W. Leet, State Director of the Farmers Home Administration,

Appellees.

Dwight Coleman; Lester Crowsheart; Sharon Crowsheart; Russel Folmer; Anna Mae Folmer; George Hatfield; June Hatfield; Donna McCabe; Diane McCabe, on behalf of themselves and others similarly situated; Gary A. Barrett; Rosemary K. Barrett; Richard L. Harmon; Betty J. Harmon; Larry L. Robertson; Nancy K. Robertson; Ross Wade; Maureen Wade;

Plaintiffs

Carl Saine; Judie Saine,

Appellants,

v.

Mike Espy, Secretary of Agriculture; Charles W. Shuman, Administrator of the Farmers Home Administration; Ralph W. Leet, State Director of the Farmers Home Administration; Harold T. Aasmundstad, District Director of the Farmers Home Administration of North Dakota; Glen W. Binegar,

as District Director of the Farmers Home Administration of North Dakota; Allen G. Drege, as District Director of the Farmers Home Administration of North Dakota; Dennis W. Larson, as District Director of the Farmers Home Administration of North Dakota; Odell O. Ottmar, as District Director of the Farmers Home Administration of North Dakota; Joseph J. Schneider, as District Director of the Farmers Home Administration of North Dakota; Samuel Delvo, as County Supervisor of the Farmers Home Administration in North Dakota; Lorace Hakanson, as County Supervisor of the Farmers Home Administration in North Dakota; Larry Leier, as County Supervisor of the Farmers Home Administration in North Dakota; Charles Schaefer, as County Supervisor of the Farmers Home Administration in North Dakota; James Well, as County Supervisor of the Farmer's Home Administration in North Dakota

Appellees.

No. 91-3384

Dwight Coleman; Lester Crowsheart; Sharon Crowsheart; Russel Folmer; Anna Mae Folmer; George Hatfield; June Hatfield; Donna McCabe; Diane McCabe, on behalf of themselves and others similarly situated; Gary A. Barrett; Rosemary K. Barrett; Richard L. Harmon; Betty J. Harmon; Larry L. Robertson; Nancy K. Robertson; Ross Wade; Maureen Wade;

Plaintiffs

Leonard Doran; Audrey A. Doran,

Appellants,

v.

Mike Espy, Secretary of Agriculture; Charles W. Shuman, Administrator of the Farmers Home Administration; Ralph W. Leet, State Direct of the Farmers Home Administration; Harold T. Aasmundstad, District Director of the Farmers Home Administration

of North Dakota; Glen W. Binegar, as District Director of the Farmers Home Administration of North Dakota; Allen G. Drege, as District Director of the Farmers Home Administration of North Dakota; Dennis W. Larson, as District Director of the Farmers Home Administration of North Dakota; Odell O. Ottmar, as District Director of the Farmers Home Administration of North Dakota; Joseph J. Schneider, as District Director of the Farmers Home Administration of North Dakota; Samuel Delvo, as County Supervisor of the Farmers Home Administration in North Dakota; Lorace Hakanson, as County Supervisor of the Farmers Home Administration in North Dakota; Larry Leier, as County Supervisor of the Farmers Home Administration in North Dakota; Charles Schaefer, as County Supervisor of the Farmers Home Administration in North Dakota; James Well, as County Supervisor of the Farmer's Home Administration of North Dakota

Appellees.

Submitted: November 12, 1992

Filed: February 23, 1993

Before JOHN R. GIBSON and MAGILL, Circuit Judges, and BOGUE,[**]
Senior District Judge

MAGILL, Circuit Judge.

This case comes to us on appeal from a decision by the district court[1] dismissing as moot an action against officers of the Farmers Home Administration (FmHA). The appellants claim that the FmHA violated a court ordered injunction and they seek civil compensatory contempt damages. We affirm the decision of the district court dismissing these actions, although we do so on different grounds. We hold that these compensatory civil contempt actions are barred under the

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[**]THE HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

[1]The Honorable Bruce M. Van Sickle, Senior United States District Judge for the District of North Dakota.

doctrine of sovereign immunity.

I.

A. Procedural History

These contempt proceedings arise out of a dispute that has been litigated in this and other federal courts for almost ten years. We provide a brief synopsis of the salient procedural history up to this point.

The three appellants in this case are members of the nationwide plaintiff class of farmers originally recognized in Coleman v. Block, 100 F.R.D. 705 (D.N.D. 1983). The plaintiffs of Coleman alleged, principally, that the then existing liquidation and acceleration procedures for farming loans provided by the FmHA violated their constitutional due process rights. The district court issued a nationwide permanent injunction on February 17, 1984. This injunction essentially required the FmHA, among other things, to give a farmer notice of options available through the FmHA loan deferral program before the FmHA could demand "voluntary conveyance" of the farmer's property or deprive the farmer of

the property in which the FmHA had an interest. Coleman v. Block, 580 F. Supp. 194, 210-11 (D.N.D. 1984).[2]

---

[2]Specifically, the district court ordered, among other things:

That the defendants, their agents, subordinates, and employees, are enjoined from:

> --Accelerating the indebtedness of the plaintiffs,
>
> --Foreclosing on the real property or chattels of the plaintiffs,
>
> --Demanding voluntary conveyance by the plaintiffs, or
>
> --Repossessing chattels of the plaintiffs or in any way proceeding against or depriving the plaintiffs of property in which the defendants have a security interest,

unless:

> 1. defendants shall give any plaintiffs against whom the defendants propose to proceed at least 30 days notice:
>
> a. That informs the borrower of his right to a hearing to contest the proposed action and to establish eligibility for loan deferral pursuant to 7 U.S.C. § 1981a;
>
> b. That provides the borrower with a statement that gives the reasons for the proposed action;
>
> c. That informs the borrower of the factors that determine eligibility for loan deferral;
>
> d. That informs the borrower of the official who

On November 1, 1985, the FmHA promulgated new regulations regarding the servicing and foreclosure of loans with the plaintiff class. The Coleman plaintiffs challenged these regulations. The district court rejected some, but no all, of the challenges to these new regulations. Coleman v. Block, 663 F. Supp 1315 (D.N.D. 1987). The parties cross-appealed to this court. During the pendency of this appeal, the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, was enacted. Because the passage of the Agricultural Credit Act rendered the class action moot, this court ordered the complaint dismissed. Coleman v. Lyng, 864 F.2d 604 (8th Cir. 1988), cert. denied, 493 U.S. 953 (1989). The district court dismissed the Coleman case on February 21, 1989.

B. The Appellants

On October 21, 1985, appellant Bart H. Dye filed, as a separate action, a petition for contempt in the district court.

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would preside at the hearing. The official designated shall not have been actively involved in the initial decision to take the proposed action.

Coleman v. Block, 580 F. Supp. 194, 211 (D.N.D. 1984).

Dye, a farmer from Indiana who had outstanding unpaid loans to the FmHA, alleged that certain FmHA officials had violated the Coleman injunction by failing to give him notice before demanding voluntary conveyance of security property for his loans. The remedy sough was an order of contempt against the FmHA and "compensatory relief in a sum which adequately compensates [him] under the circumstances herein, attorney's fees, cost of this action, and all other relief just and proper in the premises." Bart H. Dye Petition for Contempt and Complaint for Damages at 5. On May 7, 1990, Dye file a motion for summary judgment.

On February 2, 1990, Carl and Judie Saine, farmers from North Carolina, filed a motion to find certain FmHA officials in contempt. Like Mr. Dye, the Saines contend that, during the time the Coleman injunction was in place, the FmHA demanded voluntary conveyance of their farm and equipment to the FmHA without providing them the required notice under the injunction. The Saines asked the district court to:

> (b) Enter an order requiring defendants to: reconvey to plaintiffs all real and personal

> property now herein alleged; provide further financing and services to plaintiffs as required by the applicable statutes and regulations of the FmHA; and pay to plaintiffs damages in an amount sufficient to compensate plaintiffs for the lost (sic) of income and profits they suffered as a result of defendants' wrongful acts alleged herein and further emotional distress and pain they have suffered as a result of all defendants' wrongful acts.

Motion by Carl and Judie Saine to Find Contempt at 4.

Leonard and Audrey Doran are farmers from Montana. They too contend that they have been damaged by certain FmHA officials' violations of the Coleman injunction. The Dorans claim that the FmHA's failure to give them notice of their FmHA loan restructuring options pursuant to the Coleman injunctions led to the foreclosure on a loan by a private primary lender who held a first mortgage. The Dorans filed a motion for contempt on March 13, 1990, seeking the return of their land, equipment, and supplies, an adjudication that the title to their land was obtained by fraud, and other damages. Motion by Leonard and Audrey Doran to Find Contempt at 8-10.

These three motions for contempt were consolidated before

the North Dakota district court which had issued the Coleman injunctions. The FmHA moved for dismissal on October 15, 1990. On July 5, 1991, the district court granted the FmHA's motion. It held that all of these contempt actions had been mooted by the dismissal of Coleman and, therefore, dismissed the actions.

II.

We begin our analysis by pointing out that these actions are in actuality actions against the United States government. These contempt proceedings seek to compel the government to take certain steps to compensate the appellants for their losses. Specifically, the appellants seek return of property and actual government expenditures for compensatory damages for their perceived losses. A suit against the sovereign is one where the judgment sought would expend the public treasury, restrain the government from acting, or compel it to act. See Hagemeier v. Block, 806 F.2d 197, 202 (8th Circ. 1986), cert. denied, 48' U.S. 1054 (1987); Dugan v. Rank, 372 U.S. 609, 620 (1963); Larsen v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704

(1949). The appellants all are seeking contempt sanctions against various FmHA officials who were acting in their official capacities. As long as the government entity received notice and an opportunity to respond, a suit against a government employee in his official capacity is to be treated as a suit against the entity. Kentucky v. Graham, 473 U.S. 159, 166 (1985); Brandon v. Holt, 469 U.S. 464, 471-72 (1985).

The United States can only be sued when it has expressly given its consent to be sued. United States v. Mitchell, 463 U.S. 206, 212 (1983); Block v. North Dakota ex rel. Board of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983); United States v. Sherwood, 312 U.S. 584, 586 (1941). This consent must be clear and unequivocal and it will not be simply implied. United States v. King, 395 U.S. 1, 4 (1969). Indeed, the Supreme Court has stressed that waivers of sovereign immunity should be strictly construed. Library of Congress v. Shaw, 478 U.S. 310, 318 (1986). Sovereign immunity bars claims against federal officials in their official capacity unless a waiver is unequivocally expressed by Congress. See United States v. Mitchell, 445 U.S.

535, 538 (1980).

The appellants are seeking civil contempt judgments against the FmHA for violations of the Coleman injunction.[3] There are two kinds of civil contempt; coercive and compensatory. Klett v. Pim, 965 F.2d 587, 590 (8th Cir. 1992); United States v. United Mine Workers of Am., 330 U.S. 258, 303-04 (1947). With coercive contempt penalties, the court issues sanctions such as fines or incarceration to force the offending party to comply with the court's order. Klett, 965 F.2d at 950. With compensatory contempt, the court attempts to compensate the plaintiff for the damage that the offending party has cause by its contempt. Id. In this action, the appellants are seeking compensatory relief as opposed to coercive relief. They petition

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[3]Civil contempt is distinct from criminal contempt. To determine whether a contempt proceeding is civil or criminal, we must look at the substance of the proceeding and the character of the relief the proceeding will afford. Hicks v. Feiock, 485 U.S. 624, 631 (1988). "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); see Hicks, 485 U.S. at 631-32.

the court for damages cause by past actions of the FmHA. Furthermore, because the injunction has been mooted by legislation and these actions involve events that occurred in the mid 1980s, the appellants are not seeking future compliance with the Coleman injunction.

The district court held that these actions were mooted by the Agricultural Credit Act of 1987. Compensatory civil contempt actions do not survive if the underlying injunction is vacated because it was issued erroneously. Klett, 965 F.2d at 590; United Mine Workers, 330 U.S. at 295. However, compensatory civil contempt proceedings may continue when the underlying injunction abates for a reason that does not go to the jurisdiction of the issuing court. Klett, 965 F.2d at 590; see Petroleos Mexicanos v. Crawford Enters., Inc., 826 F.2d 392, 400 (5th Cir. 1987); Backo v. Local 281, United Bhd. of Carpenters & Joinders of Am., 438 F.2d 176, 182 (2nd Cir. 1970), cert. denied, 404 U.S. 858 (1971). Here, the underlying injunction was not issued erroneously and only abated by a subsequent change in legislation. Therefore, give this circuit's

recently decided Klett case, the district court's mootness rationale for its dismissal of these contempt proceedings was incorrect.

However, the district court's dismissal was still appropriate for a different reason. The appellants are not suing for statutory violations, but rather for failure to obey a court-imposed order. For purpose of determining whether these actions may proceed, we must determine whether there has been an explicit, unequivocal waiver of sovereign immunity to proceed for an action alleging compensatory civil contempt of such a judge-made order. We find that there is no such waiver.

Congress has enacted a statute governing the contempt powers of the federal courts. This statute, 18 U.S.C. § 401, reads in its entirety:

> A court of the United States shall have such power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

This court has held that this statute governs civil as well as criminal contempt. United States ex rel. Shell Oil Co. v. Barco Corp., 430 F.2d 998, 1000 (8th Cir. 1970); see also Taylor v. Finch, 423 F.2d 1277, 1279 (8th Cir.) ("Courts have power to adjudge persons who willfully disobey their orders to be in contempt and such power extends to both civil and criminal contempt."), cert. denied, 400 U.S. 881 (1970). The Klett court also recognized the applicability of this section in a factual situation similar to this. Klett, 965 F.2d at 591.

On the fact of this statute, there is nothing to suggest that Congress intended to waive sovereign immunity. The statue does not address the issue and does not provide explicit, unequivocal language allowing the government to be sued. See King, 395 U.S. at 4. According to Supreme Court precedent, such a waiver must not be implied. Id.

The Supreme Court has never ruled on whether this statute constitutes a waiver of sovereign immunity. The cases interpreting this statute have consistently held that it should be

narrowly construed as a limitation on lower federal court power to issue summary contempt order. See, e.g., Cammer v. United States, 350 U.S. 399 (1956) (holding that a lawyer is not the kind of "officer" who can be tried summarily for contempt under this statute); In re Michael, 326 U.S. 224 (1945) (construing history of § 268 of the Judicial Code, precursor to U.S.C. § 401, as embodying a congressional plan to limit the contempt power to the least possible power adequate to end proposed); Nye v. United States, 313 U.S. 33 (1941) (discussing the history of the Contempt Act of March 2, 1831, on which the modern 18 U.S.C. §401 is based, and finding that its purpose was greatly to limit the contempt power of federal courts).[4] To prevail in their fight to show a waiver of sovereign immunity,

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[4]For further discussions of the history of the Contempt Act of March 2, 1831, see Felix Frankfurter & James M. Landis, Power of Congress over Procedure in Criminal Contempt in "Inferior" Federal Courts - A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924); Walter Nelles & Carol Weiss King, Contempt by Publication in the United States to the Federal Contempt Statute, 28 Colum. L. Rev. 401 (1928); Walter Nelles & Carol Weiss King, Contempt by Publication in the United States Since the Federal Contempt Statute, 28 Colum. L. Rev. 525 (1928).

the appellants must demonstrate a "legislative intent...so clear and explicit as to brook no reasonable doubt." Hubbard v. Environmental Protection Agency, No. 90-5233, 1992 WL 335052, at *1 (D.C. Cir. Nov. 27, 1992) (quoting In re Perry, 882 F.2d 534, 544 (1st Cir. 1989)). The appellants have demonstrated no such legislative intent, nor have been able to find one. Accordingly, we will not imply into this statute an express waiver of sovereign immunity for the federal government to be sued for civil compensatory contempt.

In a case almost identical to this one factually, this court has indicated its disinclination to allow the type of recovery the appellants seek here. In McBride v. Coleman, 955 F.2d 571 (8th Cir.), cert. denied, 113 S. Ct. 65 (1992), this court wrote:

> The government argues strenuously that sovereign immunity precludes an award against the government of compensatory damages, indistinguishable from those that might be awarded in a contract or tort action, in a civil contempt proceeding. This is a weighty argument, and we regard it very seriously. It does strike us as being a dubious proposition that by filing a contempt motion a claimant can be positioned to recover an unlimited amount of compensatory damages from the United States without being bound by the strictures of either

> the Tucker Act or the Federal Tort Claims Act, which are express (but carefully limited) waivers by the United States of its sovereign immunity with respect to contract and tort claims. Absent an express waiver of sovereign immunity, money awards cannot be imposed against the United States. See United States v. Mitchell, 463 U.S. 206,212, 103 S. Ct. 2961, 2965, 77 L.Ed.2d 580 (1983); Block v. North Dakota, 461 U.S. 273, 280, 103 S. Ct. 1811, 1816, 75 L.Ed.2d 840 (1983). See also Barry v. Bowen, 884 F.2d 442, 443-44 (9th Cir. 1989) (holding that district court's award of monetary sanctions for contempt violated the sovereign immunity of the United States, but also reversing on other grounds). There does not appear to be any express waiver of sovereign immunity applicable to this case. We therefore have grave doubts that contempt power can be carried as far as it has been carried against the United States in the present litigation.[5]

McBride, 955 F.2d at 576-77 (footnote omitted).

We agree with the quoted language from the McBride court and we adopt it to the present situation. The gravamen of the contempt actions here is that the Coleman injunction established a standard of care regarding the notice that must be

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[5]The McBride court did not reach this final conclusion, however, and it held that damages awarded by the district court were erroneous and not sustainable because they were not, in fact, caused by violation of the Coleman injunction. Id. at 577.

given to its borrowers. The appellants contend that the FmHA officials failed to live up to this standard of care. The appellants further argue that they were consequently damaged by the officials' failure to adhere to the appropriate standard of care. They seek sanctions from the government to place them in the position they would be in if the standard of care had not been breached. We find this to be essentially a tort action, recovery for which must be south through the Federal Tort Claims Acts (FTCA), 28 U.S.C. §§ 2671-2680, and not through contempt proceedings. We note further that the FTCA provides that it is the exclusive remedy for such action. 28 U.S.C. § 2679(b) (1).[6]

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[6]This section provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by the reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject

"[T]he contempt power is not to be used as a comprehensive devise for redressing private injuries...." McBride, 955 F.2nd at 577. We are able to find no authority that allows us to imply a waiver of federal sovereign immunity for civil compensatory contempt actions either in the statute defining federal courts' contempt powers or in its history. We note further that "in light of the potentially significant effect on the public fisc," we will not lightly imply such a waiver in this situation. Hubbard, 1992 WL 335052, at *3. We simply do not think it is within our power to allow the appellants to proceed with these compensatory civil contempt proceedings and to circumvent the strictures of the Federal Tort Claims Act which Congress specifically provided for this type of relief.

III.

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matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(b) (1).

Accordingly, we affirm the decision of the district court dismissing the underlying actions for contempt,but on the grounds herein expressed.

A true copy.

Attest: CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

DWIGHT COLEMAN, et al.,

Plaintiffs,

v.

EDWARD L. MADIGAN, Secretary, U.S. DEPARTMENT OF AGRICULTURE FARMERS HOME ADMINISTRATION, et al.,

Defendant

MOTION BY BILLY KEITH GAGE AND MARY E. GAGE TO FIND CONTEMPT — Civil No. A1-83-047-16

MOTION BY DALE GEORGE AND SHERRY GEORGE TO FIND CONTEMPT — Civil No. A1-83-047-08

MOTION BY LEONARD DORAN AND AUDREY DORAN TO FIND CONTEMPT — Civil No. A1-83-047-21

MOTION BY CARL SAINE AND JUDIE SAINE TO FIND CONTEMPT — Civil No. A1-83-047-20

MOTION BY BART DYE TO FIND CONTEMPT — Civil No. A1-83-047-07

MEMORANDUM AND ORDER

The above complainants, members of the national class of Farmers Home Administration [FmHA] borrowers certified by this Court's order in Coleman v. Block, 100 F.R.D. 705 (D.N.D.

1983), have brought motions to find the successor defendants in contempt of the permanent injunction entered by this Court in Coleman v. Block, 580 F. Supp. 194 (D.N.D. 1984). Coleman enjoined FmHA agents, subordinates and employees from:

- Accelerating the indebtedness of the plaintiffs,
- Foreclosing on the real property or chattels of the plaintiffs,
- Demanding voluntary conveyance by the plaintiffs, or
- Repossessing chattels of the plaintiffs or in any way proceeding against or depriving the plaintiffs of property in which the defendants have a security interest, unless:

    1. defendants shall give plaintiffs against whom the defendants propose to proceed at least 30 days notice . . .

Coleman, 580 F. Supp. at 211. The Court required that the notice: (a) Inform the borrower of his [or her] right to a hearing to contest the proposed action and to establish eligibility for loan deferral; (b) provide the borrower with a statement that gives the reasons for the proposed actions; (c) inform the borrower of the factors that determine eligibility for loan deferral; (d) inform the borrower of the official that would preside at the hearing. Id. The above complainants each assert

that the defendants demanded a voluntary conveyance or accelerated an indebtedness without proper notice in violation of the permanent injunction.

In February, 1989, pursuant to an order by the Eighth Circuit Court of Appeals in Coleman v. Lyng, 864 F.2d 604 (8th Cir. 1988), cert. denied, _____ U.S. _____, 110 S. Ct. 364 (1989) vacating the Coleman injunction order as moot based on the passage of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988) and ordering a dismissal of the action, this Court accordingly dismissed the Coleman case. See Coleman, Civil No. A183-47 (D.N.D. Feb. 21, 1989).

The defendants assert that this Court lacks jurisdiction to hear the above contempt actions in view of the dismissal of the underlying Coleman case and on the basis of the doctrine of sovereign immunity. Because the Court finds that it has general jurisdiction to order sanctions for contempt against the government, but that the contempt claims in this case have been mooted by the dismissal of Coleman, the above contempt actions must be dismissed.

DISCUSSION

The Court's Contempt Power and Sovereign Immunity

The above complainants seek to have this court invoke its contempt power and order compensatory and other relief in their favor and against the successor defendants. It is unquestionable that courts have inherent power to enforce compliance with lawful orders through the use of contempt. Shillitani v. United States, 384 U.S. 364, 370, 86 S. Ct. 1531, 1535 (1966); United States v. United Mine Workers, 330 U.S. 258, 330-32, 67 S. Ct. 677, 713-14 (1947); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873). Contempt proceedings, both civil and criminal, arise out of 18 U.S.C. Section 401 which provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ...
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

See United States ex rel. Shell Oil Co. v. Barco Corp., 430 F.2d 998, 999-1001 (8th Cir. 1970).

In contrast to the court's power to order contempt sanctions, the defendants assert the applicability of the doctrine of sovereign immunity as to the government. Because the claimants have failed to identify any express waiver of sovereign immunity, the government argues this Court lacks jurisdictional authority to award damages.

The issue of whether sovereign immunity applies to contempt proceedings against the federal government, and the FmHA in particular, has not been visited by the United States Supreme Court. It is indeed fundamental, however, that the United States only can be sued where it has explicitly given its consent and it is that consent which governs the court's jurisdiction to hear the suit. United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965 (1983); Block v. North Dakota, 461 U.S. 273, 280, 103 S. Ct. 1811, 1816 (1983); United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 769-70 (1941).[1]

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[1]A suit against the sovereign is one where the judgment sought would expend the public treasury or would restrain the Government from acting or compel it to act. Hagemeier v. Block, 806 F.2d 197, 202 (8th Cir. 1986), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192 (1987) (citing Dugan v. Rank, 372 U.S.

The doctrine of sovereign immunity would then bar claims against the federal government and federal officials in their official capacities unless a waiver of sovereign immunity is 'unequivocally expressed.' See Mitchell, 445 U.S. at 538, 100 S. Ct. at 1351; Hagemeier, 806 F.2d at 202.

The Eighth Circuit Court of Appeals has addressed the issue of the FmHA's sovereign immunity on numerous occasions, but not in the context of contempt proceedings. An example is Hagemeier, where the circuit court held that sovereign immunity barred an action by farmers seeking relief against the FmHA for the agency's failure to provide personal notice of alternative loan deferral methods, and for violations of statutory and constitutional rights. Hagemeier, 806 F.2d at 202-03. Similarly, in United States v. Perry, 706 F.2d 278 (8th Cir. 1983) the court affirmed this Court's dismissal of a

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609, 620, 83 S. Ct. 999, 1006 (1963)). Additionally, as long as the government receives notice and an opportunity to respond, a suit against a government official in his or her official capacity is "in all respects other than name" to be treated as a suit against the government and not against the official personally. Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 2099, 3105 (1985).

counterclaim by borrowers against the FmHA that the agency violated the farmers' constitutional rights by accelerating their loans. Although these cases are similar to the original claims in Coleman, which alleged abusive liquidation procedures by the FmHA, neither involved claims for the imposition of contempt sanctions pursuant to the Coleman injunction.

The government cites Barry v. Bowen, 884 F.2d 442 (9th Cir. 1989), wherein the court of appeals denied the imposition of monetary contempt sanctions against the Secretary for Health and Human Services [HHS] based on sovereign immunity grounds. In that case, the plaintiff sought sanctions for failure by HHS to pay court ordered awards and attorneys fees. The plaintiff failed to suggest, and the court did not find, "anything which suggests that the United States has waived its sovereign immunity with respect to contempt sanctions." Id. at 443.

Nonetheless, a number of courts have affirmed monetary contempt sanctions against the federal government despite the general rule of sovereign immunity. See Norman Bridge Drug

Co. v. Banner, 529 F.2d 822 (5th Cir. 1976) (civil contempt fine levied against Administrator of Drug Enforcement Administration for failure to obey court order to return drugs); Nelson v. Steiner, 279 F.2d 944 (7th Cir. 1960); Hinton v. Sullivan, 737 F. Supp. 232 (S.D.N.Y. 1990) (claimant awarded $1,000 in damages as remedy for contempt against Secretary of HHS). In Nelson, the court affirmed a civil contempt award against the district director of internal revenue and the claims division chief of the Department of Justice for failure to obey the district court injunctive order. The court stated in no uncertain terms: "The executive branch of government has no right to treat with impunity the valid orders of the judicial branch. An order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until reversed by orderly and proper proceedings." Id. at 948. Finally, it should be noted that the Eighth Circuit Court of Appeals in Hartman v. Lyng, 884 F.2d 1103 (8th Cir. 1989) upheld this Court's findings of contempt against these same defendants, and did not take the opportunity to reverse the contempt finding on

sovereign immunity grounds.[2]

Based on the foregoing, the Court finds that the doctrine of sovereign immunity cannot be used as a basis to deny claimants jurisdiction in civil contempt actions against the federal government in these cases. It is fundamental that any judicial order founded in proper jurisdiction must be complied with until later reversed; the failure to comply to a valid order by an individual, whether a government official or a private citizen, creates a contempt for the inherent and statutory power of the judiciary to issue rulings and orders.

To deny courts, via the doctrine of sovereign immunity, the ability to enforce lawful orders involving the executive branch vitiates the courts' inherent authority to sanction by allowing the federal executive to act with impunity as to any judicial order. As stated in Nelson, the equality of the branches of federal government demands that the executive branch accede

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[2]In Hartman, this court of appeals also upheld the determination that the claimants had suffered no damages as a result of the actions of the contemnors. No monetary sanction was ordered as a result of the contempt.

to the lawful and proper exercise of the judiciary's power against it. Any other result would leave the courts, and more importantly individual citizens, without the power to seek redress against the government when a valid court order has been ignored or violated.

In this case, the Court properly ordered the FmHA to provide farmers the opportunity to work out solutions to their financial problems prior to government forced liquidation. Without claiming the original order invalid based on jurisdictional or other grounds, the government cannot now claim that the method used by the Court in enforcing it lawful order, a contempt sanction, is barred under the doctrine of sovereign immunity. The court therefore denies the defendants' claim that the court lacks jurisdiction to order contempt sanctions in this case.

Mootness

The government argues, as it did in Lyng, that the present controversy has been rendered moot by the passage of federal legislation concerning the issues raised in Coleman. Lyng was an appeal by farmers concerning the validity of certain FmHA's loan servicing policies regarding adverse action against borrowers, including the "pretermination package" established on November 14, 1983 after the court's Coleman preliminary injunction, and notice forms FmHA 1924-14, 1924-25, which superseded the pretermination package on October 19, 1984. The borrowers had challenged these policies under the Due Process Clause and the Administrative Procedures Act, 5 U.S.C. Sections 551-706.[3]

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[3]In an order dated May 7, 1987, this Court declined to grant relief to borrowers whose loans had been accelerated through forms FmHA 1924-26. On reconsideration, this Court issued a supplemental order on June 2, 1987 in which some borrowers were granted relief. This Court partitioned the class of borrowers into three distinct groups for purposes of relief: Group 1 consisted of those farmers who had received the faulty forms, but whose loans had not been accelerated as of May 7, 1987; those farmers whose loans had been accelerated between the May 7 and June 2 orders had their accelerations reversed and were treated as part of Group 1 borrowers. Group 2

While on appeal, the Agricultural Credit Act of 1987 became law. The court of appeals held that the legislative remedies provided for in the Act were an enactment of earlier Coleman decisions, thus rendering issues of notice moot.[4] It

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consisted of farmers who had received the faulty forms, who had had their loans accelerated prior to May 7, and who still held title to the collateral property. Group 3 encompassed those farmers who had received the faulty forms and had already lost title to their collateral property.

This Court held that as to the first group, the FmHA was enjoined from, among other things, accelerating the loans without providing the borrowers a corrected set of forms. As to the second group, the court enjoined the FmHA from foreclosing on the borrowers' property until 30 days after the corrected forms were made available in FmHA offices. The third group of farmers were denied relief, as retroactive relief would have been inequitable, but this Court noted that any damages resulting from defective notice could be sought through the borrowers' local courts.

[4]Among other things, the court of appeals stated that the Act statutorily provided for what this Court had required on constitutional grounds: Each borrower threatened with adverse action must be given a readable summary of alternative loan servicing programs; each borrower may select among the various options and does not waive rights to be considered under them; the Secretary of Agriculture must suspend acceleration, liquidation and foreclosure until the new notice forms were implemented by the agency. See Section 331D(a), Consolidated Farm and Rural Development Act (CFRDA), 7 U.S.C. Section 1981 et seq.; Coleman, 864 F.2d at 608-10.

is an "incorrect assumption," stated the Lyng court, "that Congress intended its reform of FmHA practices to operate separately from the federal courts' adjudication of claims arising during the period preceding the Act." Lyng, 864 F.2d at 611. Moreover, the court of appeals added that courts:

> [L]ack the power to add to or subtract from the remedy enacted by Congress. This is true, not because Congress can determine how particular cases before the courts are decided, but because the actual source of any relief in this case is necessarily the statutory provision for agricultural credit which Congress amended in 1987. Congress is free to alter such a system of entitlements during the pendency of a case, and when it does so, the reviewing court must 'apply the law as it is now, not as it stood below.' Kremens v. Bartley, 431 U.S. 119, 129, 97 S.Ct. 1709, 1715, 52 L.Ed.2d 184 (1977). . . .Congress [] can change the statutory rights of litigants even where this change may retroactively eliminate an initially meritorious claim, except where the new statute itself is for some reason unconstitutional.

Id. The court of appeals therefore found that because the farmers could not present a constitutional claim that survived the ACA, there was no longer a live case or controversy for adjudication.[5] It therefore vacated the orders and judgment of

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[5]However, the court of appeals did not in any way limit future constitutional challenges to the ACA:

this Court and ordered dismissal of the complaint as moot. Id. at 612. On February 21, 1989, pursuant to the directive by the court of appeals, this Court dismissed the Coleman action and complaint, Civil No. A1-83-47, as moot.

The Aftermath of Coleman's Dismissal

It is a general rule that upon dismissal of an underlying action, a pending civil contempt arising from an order in the case must be dismissed as moot. Conversely, a pending criminal contempt action survives the dismissal of the underlying action. See Gompers v. Buck Stove and Range Co., 221 U.S. 418, 31 S. Ct. 492 (1911); United States v. United Mine Workers, 330 U.S. 258, 67 S. Ct. 677 (1947); Shillitani v. United States, 384 U.S. 364, 86 S. Ct. 1531 (1966); De Parcq v.

> [F]uture litigants are also free to pursue constitutional challenges similar to those raised in this case. However, the possibility that FmHA acceleration procedures may be challenged on constitutional grounds at some point in the future does not justify burdening the District Court with perpetual jurisdiction over a controversy that is currently moot.

Lyng, 864 F.2d at 610 n.5.

United States District Court, 235 F.2d 692, 700 (8th Cir. 1956). To determine whether the present cases survive the dismissal of the original action, the Court must first determine whether the above contempt actions should be classified as criminal or civil in nature.

The application of the labels "civil" and "criminal" to contempt actions has historically confused courts and commentators. This confusion stems from a misapplication of the original nature of a court's contempt power:

> [T]he original law of contempt embraced only what is now known as criminal contempt. The contempt power was directed at offensive conduct which derived its criminality from the active interference with the crown or its acting official agents. What is now called civil contempt was originally called contempt in procedure and was considered a quasi-contempt; contempt in theory and name alone. It was not what was classically understood to be contempt. It was akin to the novel and peculiar crime of contempt, but was quite apart in purpose and procedure. Primarily, it was an equitable civil procedural device to secure obedience to court orders.
>
> * * *
>
> So, it seems that there was not, as is now the case, a body of law dubbed contempt, but divided into two separate parts--civil and criminal. Rather, there was a body of contempt law, and a distinct procedural device, like contempt, called contempt, but not really contempt.

See **Goldfarb, The Contempt Power,** 50-51 (1963). As courts began to exercise greater equitable powers to punish both criminal and procedural or "civil" contempt, the distinction between the two blurred. The result has been an attempt by courts, from the time of Gompers, to present classification formulae with regard to contempt actions; but these are at best vague guidelines for district courts to determine which label to apply. Id. at 66.[6]

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[6]Most courts decide on the basis of the "special characteristics of the act, the remedy sought, the nature of the action, and the aim of the remedy, whether the act looks like what has been vaguely considered civil or criminal in the past." **Goldfarb** at 66. Generally, offenses involving deliberateness, bad faith, and fraud or such as the obstruction of court trials or proceedings, attacks on or interference with court personnel, parties, or jurors, have been classified by courts as criminal contempt. Id. at 66-67. Acts such as "disobedience to judgments, orders, or court process, and the like, have been considered civil contempts." Id. at 67. Nonetheless:

> A thorough consideration of the cases leaves the distinct impression that courts apply an ad hoc kind of accounting to contempt situations and arrive at conclusions which, no matter how just in the immediate sense, compose only the most casual and intellectually unsatisfying link with any body of law or legal principle.

Id.

In Gompers, the Court determined that it was the character and purpose of the sanction which served to distinguish criminal and civil contempt actions. Gompers, 221 U.S. at 441, 21 S. Ct. at 498; see also Shillitani, 384 U.S. at 369, 86 S. Ct. at 1535. The Court went on to establish four factors to make such a determination: (1) Refusal to do an act commanded is civil contempt, while doing a forbidden act is criminal contempt; (2) Punishment for criminal contempt is unconditional, while the judgment for civil contempt is conditional in nature and can be terminated if the contemnor purges himself of the contempt; (3) Civil contempt proceedings are entitled as part of the main cause, while criminal contempt actions are brought in the name of the United States; and (4) The notice in a criminal contempt proceeding must state that the proceeding is criminal in nature. Gompers, 221 U.S. at 441-46, 31 S. Ct. at 498-500; De Parcq, 235 F.2d at 699 (applying the Gompers factors).

More recently, the Supreme Court has again addressed and modified the defining characteristics of civil and criminal contempt proceedings. The "critical features are the substance

of the proceeding and the character of the relief that the proceeding will afford." Hicks v. Feiock, 485 U.S. 624, 631, 108 S. Ct. 1423, 1429 (1988); Roe v. Operation Rescue, 920 F.2d 213, 216 (3rd Cir. 1990).[7] If the action:

> 'is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.' Gompers v Bucks Stove and Range Co., 221 U.S. 418, 441 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911). The character of the relief imposed is thus ascertainable by applying a few straightforward rules. . . . If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court . . . .

Hicks, 485 U.S. at 631-32, 108 S. Ct. at 1429. By adopting these "simple rules," the Court avoided "any alternative formulation that would make the classification of the relief

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[7]Hicks involved an appeal from contempt proceeding in California state court based on federal constitutional grounds. The Supreme Court "was merely expounding federal law, however, which governs the classification of state contempt proceedings as civil or criminal insofar as it affects the availability of federal rights. See [Hicks] at 1429. Nothing in Hicks, or anywhere else, suggests that the rules are any different for classifying federal court contempt proceedings." Gregory v. Depte, 896 F.2d 31, 39 n.19 (3d Cir. 1990) (Becker, C.J., concurring).

imposed in a State's proceedings turn simply on what [the court's] underlying purposes were perceived to be." Id. at 1431.[8]

Based on both these modern and historical guidelines for classification of contempt proceedings, the nature of the contempt action in this case and its sanction must be considered civil. The complainants seek to have this court impose a remedial fine against the defendants, of which the complainants themselves, and not the court, will be compensated. Even if the fine exceeds an amount which would merely compensate the complainants, the nature and the character of the proceeding would still be civil under Hicks, since the fine would be payable to the complainants and not the court and would be remedial in nature.

Other factors which point to these actions being civil in

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[8]Therefore, the Court appeared to have abandoned the earlier view of the Gompers and Shillitani Courts suggesting a district court's subjective intent or purpose in imposing the sanction was a relevant factor in determining the classification of the relief. The Court, however, does not seem to throw out entirely the factors Gompers suggests.

nature include the fact that the original Coleman action was brought by private individuals against the government, and not vice versa. The complainants' claims do not purport to be criminal in nature and do not suggest criminal sanctions against the defendants. The fact that the court is attempting through contempt to punish the doing of a forbidden act, however, would favor a finding of criminal contempt. Nonetheless, what the court is attempting to accomplish through contempt, or its purpose in finding contempt, can not be considered a factor after Hicks, only the nature and character of the contempt proceeding.

Therefore, based on the foregoing principles the court finds that the contempt actions before it must be considered civil, and not criminal, in nature. Under the general rule that civil contempt actions do not survive the dismissal of the underlying action and the vacation of the original injunction order, this court is required to dismiss them as moot.

CONCLUSION

The Court finds that, although it has jurisdiction to hear civil contempt proceedings against the federal government, it lacks the authority in the above cases to order contempt sanctions as the underlying Coleman action has been dismissed and the injunction vacated pursuant to the direction of the circuit court.

IT IS THEREFORE ORDERED:

THAT THE ABOVE CONTEMPT ACTIONS BE DISMISSED AS MOOT.

Dated this 5 day of July, 1991.

s/By Bruce M. Van Sickle
United States District Court Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3123NDBI

Bart H. Dye, et al.,
Appellant,

vs.

Edward Madigan, et al.,
Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

Judge Beam took no part in the consideration or decision of this case.

April 5, 1993

Order Entered at the Direction of the Court:

s/By: Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit